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NOV 23 1992

Before the  
Federal Communications Commission  
Washington, DC

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Application of

RICHARD P. BOTT, II

Assignor

and

WESTERN COMMUNICATIONS, INC.

Assignee

File No. BAPH-920917GO

For Assignment of Station  
KCVI(FM), Blackfoot, Idaho

REPLY TO OPPOSITION TO PETITION TO DENY

SUMMARY

This is a reply to the Opposition filed by Richard P. Bott, II ("Bott") to the "Petition to Deny" filed by Radio Representatives, Inc. ("RRI") with regard to the above-referenced application.

As seen herein, nothing argued by Bott justifies grant of the underlying application. Bott admits that he obtained the grant of the permit for which transfer is being sought only after making pledges to the Commission concerning integration, which now will not be fulfilled. Bott's belief that he has an unfettered right to assign his permit in these circumstances is incorrect. Precedent makes clear that before such an assignment application will be granted, the Commission will examine the comparative credit awarded to the applicant, the extent the credit will be maintained after grant of the application, and whether the Commission's licensing

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process will be infringed, all to determine whether the public interest will be served by grant of the application. The Commission thereby restricts the transferability of permits obtained through the comparative hearing process.

The reasons provided by Bott to support his sale of the permit are neither substantial nor accurate. For the first time, Bott has revealed that his integration pledge has always been contingent on his ability to establish a profitable, religious station, which itself is inconsistent with the integration pledge made in this proceeding. Moreover, close analysis shows that upon the initiation of service Bott's facility would become the dominant religious facility in the marketplace. Therefore, his "reasons" for the sale of the permit do not bear close scrutiny.

Finally, grant of Bott's application is contrary to the public interest and will lead to abuse of the Commission's processes. The Commission does not allow for the substitution of "white knight" third-parties in the hearing context. So, too, should they be forbidden here.

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**REPLY TO OPPOSITION TO PETITION TO DENY**

Radio Representatives, Inc. ("RRI"), by its attorney, hereby submits its response to the "Opposition to Petition to Deny" filed by Richard P. Bott, II ("Bott") on November 10, 1992. With respect thereto,<sup>1</sup> the following is stated:

<sup>1</sup> Bott argues that RRI does not have "standing" for filing its Petition. It is respectfully asserted, however, that RRI is an "aggrieved party" within the meaning of Section 309(d) of the Communications Act insofar as RRI currently remains a competitor with Bott for the frequency by virtue of RRI's filing of a "Petition to Reopen the Record" on October 26, 1992 with the full Commission, and a "Petition for Recall of the Mandate of the Court and for Remand to Reopen the Record" with the United States Court of Appeals with respect to the allotment on October 28, 1992.

In any event, even if it did not have "standing," the matters asserted in RRI's Petition would properly be considered as an informal objection to Bott's application. Accord, TV-8, Inc., 2 FCC Rcd 1218, 1221 n.1 (1987).

Bott also complains that RRI's Petition is deficient insofar as it does not include an affidavit of a person with personal knowledge of the facts. Bott Opposition at 4. Such an "affidavit," however, is not necessary in situations as here where

### Background

As RRI established in its Petition, Bott's assignment application must be denied insofar as approval of the application would permit Bott to abuse the Commission's processes by abandoning the pledges he made to the Commission in acquiring the construction permit for which approval for assignment is being requested. As RRI established, and significantly, as Bott does not at all deny, the only reason Bott has a permit to assign is because he pledged unconditionally to be integrated full-time for an indefinite term into the operations of the proposed station. Those promises led to a six and one-half year proceeding during which Bott failed ever to retreat from his integration pledge,<sup>2</sup> and led to the ultimate

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the facts being relied upon (e.g., Bott's previous integration commitments) are subject to official notice. See 47 U.S.C. § 309(d).

<sup>2</sup> In his Integration Statement filed with the FCC September 11, 1987, Bott stated:

Richard P. Bott, II, an individual applicant, proposes to work full-time, 40 or more hours a week, as General Manager of his proposed station at Blackfoot, Idaho. In this capacity, he will supervise all personnel and otherwise will be responsible for all day-to-day operations at the station in the areas of programming, promotion, technical operations and business affairs. Mr. Bott plans to seek enhancement credit for his broadcast experience and his plan to establish his full-time residence in Blackfoot.

Three months later, Bott reiterated that promise, stating unequivocally:

Mr. Bott will serve as General Manager of the proposed station, working at the station on a full-time basis of at least 40 hours per week. As General Manager, he will supervise all

personnel and otherwise be responsible for all day-to-day operations of the station in the areas of programming, promotion, technical operations, and business affairs.

Bott Hearing Exhibit 4. That commitment was perpetuated in oral testimony, wherein Bott testified that he was an officer and employee of his father's corporation, Bott Communications, Inc., and that he intended to leave his father's employment:

Blackfoot represents an opportunity for me to get out into business on my own and to have my own radio station and build something for myself.

TR 56. Accord, Bott Exh. 4 at 3. During cross-examination, he similarly stated:

Q: Assuming you get this grant do you have any plans right now to only own this property for a finite period of time?

A: No, I have no plans to sell if that's what you mean.

\* \* \*

Q: Do you intend to live in Blackfoot for an indefinite period of time?

A: Yes.

TR 77-78. Bott continued to claim that he would move to Blackfoot and work full-time (40 hours per week) in the Proposed Findings of Fact and Conclusions of Law of Richard P. Bott, II filed on February 8, 1988, whereby Bott asserted:

Richard P. Bott, II will be permanently integrated into the day-to-day operation and management of his proposed station on a full-time basis of at least 40 hours per week.

Proposed Findings of Fact and Conclusions of Law at ¶ 70. This resulted in the award to him of 100% quantitative integration credit. Initial Decision of Administrative Law Judge Edward Luton, 3 FCC Rcd at 7096 ¶ 38. Bott directly relied on the integration preference obtained by him in arguing in support of the affirmance of the grant of his application before the Review Board and never withdrew his integration statement throughout the pendency of exceptions before the Review Board (January 11, 1989 - June 5, 1989), the Application for Review before the Commission (July 7, 1989 - April 12, 1990), of the Appeal before the United States

affirmance of the grant to Bott. During the course of the proceeding, his father revealed to the Commission that which Bott refused, namely that his son's true intentions were to remain at his current employment at his father's corporation (Bott Broadcasting, Inc.) (Raymond J. and Jean-Marie Strong, 6 FCC Rcd 553, 567 (ALJ 1991) ("Mr. Bott [Sr.] sought to allay any concern about his longtime work habits by pointing out that his son, Richard, Bott II was now ready to take over for him").<sup>3</sup> Bott denied the allegation,<sup>4</sup> and accepted ownership of the permit.<sup>5</sup>

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Court of Appeals for the District of Columbia Circuit (April 30, 1989 - February 22, 1991). Moreover, specific questions were raised by RRI to the Court on February 7, 1991 concerning whether Bott truly intended to effectuate his integration commitment in the Blackfoot proceeding. Bott specifically claimed that although "RRI constructs a theory that Bott will not carry through on his integration pledges Bott made to the FCC in the instant case...[that] claim is wide of its mark."

<sup>3</sup> That decision is now final. As the Review Board stated in Ocean Pines FM Partnership, 5 FCC Rcd 3490 (Rev. Bd. 1989), "the findings and conclusions regarding a particular party in one hearing proceeding are plainly relevant in another proceeding..." Id. at 3491, ¶ 5. An initial decision is not a mere report to be arbitrarily disregarded. Stereo Broadcasters, Inc., 74 F.C.C.2d 543, 545 (1979), aff'd, 652 F.2d 1026, 1030 (D.C. Cir. 1981).

<sup>4</sup> "Response to Motion to Remand to Reopen the Record" filed by Bott on February 19, 1991.

<sup>5</sup> To provide another example of the gamesmanship occurring in this proceeding, in opposing RRI's February 7, 1991 "Motion for Remand to Reopen the Record" presented to the Court of Appeals, Bott argued:

Interestingly, since Bott, Sr. did not receive the construction permit, he will not be moving to Bartlett and requiring a replacement for his present position. That eliminates any questions that Bott has a restriction on his ability to relocate to Blackfoot.

"Response to Motion to Remand to Reopen the Record" at 2 n.1.

Now, one and one-half years after the conclusion of the lengthy proceeding, Bott conveniently has "changed his mind" about wanting to move to Blackfoot and operate the facility, and feels that the competitive situation in Blackfoot, Idaho has changed such that he no longer wishes to own the permit. Bott claims that he pursued the permit in order to construct a commercial religious station, that another religious station commenced operation in September 1991, that the station carries many of the programs he hoped to broadcast on his station, and that the economy is too "soft" to support two commercial religious stations. When he decided that the sale of the permit was the "best thing to do," rather than return the permit to the Commission or transferring without consideration to RRI (the party which would have received the permit had Bott withdrawn his integration pledge earlier), Bott instead accepted Western Communications' offer to purchase the permit, pursuant to which Bott will receive as much as \$100,000.

#### ARGUMENT

##### A. Bott's Application Must Be Designated For Hearing

Regardless of Bott's arguments to the contrary, Bott's application still must be designated for hearing. What Bott either fails to realize or to note is that he failed throughout the

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"Interestingly," as Bott notes at page 2 n.1 of his Opposition, Bott, Sr. filed exceptions to the Board's decision, defending his integration claims.

Therefore, at the same time as Bott was claiming in the Blackfoot proceeding that his father would not move to Bartlett, Tennessee (in an attempt to buttress his credentials in this proceeding), Bott, Sr. was claiming that the move still would occur. The inconsistencies and gamesmanship continue.



proceeding to reveal that his integration promises were "contingent" upon the initiation of any specific format, any specific competitive environment, or even his ability to make a profit. Had he done so, his contingent integration pledge would have been rejected. See, e.g., Revision of Application for Construction Permit for Commercial Broadcast Stations, 4 FCC Rcd 3860 ¶ 54 (1989) ("[w]e have traditionally required an unequivocal promise of ownership participation to merit integration credit; and accordingly, we have consistently denied integration credit for contingent integration proposals"). As the Review Board noted in Victorson Group, Inc., 6 FCC Rcd 1697 (Rev. Bd. 1991):

we find [the applicant's] commitment to devote full-time to radio station management to be so contingent on externalities, as well as the fickle vicissitudes of business fortune, that [we will not award integration credit].

Id. at 1699 ¶ 11. See also, Charisma Broadcasting Corp., 6 FCC Rcd 3411, 3413 ¶ 10 (Rev. Bd. 1991) (no integration credit awarded where integration is contingent upon success of Congressional campaign). Bott's failure to fully disclose the contingencies under which he would integrate into the operations of his station itself constituted fraud on the Commission's processes.

Bott's apparent belief that he can casually assign even a permit received through the comparative hearing process (as long as he is receiving no profit) is contrary to Commission precedent or good administrative policy. Bott cites Eagle 22, Ltd., 7 FCC Rcd 5295, 5297 (1992) and TV-8, Inc., 2 FCC Rcd 1218, 1220 (1987) in support of his position. Bott Opposition at 6. Neither case is

dispositive of the facts of this case. Significantly, although in both cases cited by Bott the Commission permitted the assignment of bare permits that were issued "after a comparative hearing," in neither case was the permit awarded on "comparative" grounds that would be destroyed as a result of the grant of the assignment. Specifically, in the proceeding underlying the grant of the permit for Channel 16, Somerset, Kentucky to TV-8, Inc., the competing applicant for the permit was not afforded comparative consideration due to its proposed satellite operation. TV-8, Inc., 52 R.R.2d 423, 426 (Rev. Bd. 1982), aff'd, FCC 83-238 (Aug. 29, 1983). Therefore, unlike here, no decisionally significant loss of integration credit was precipitated by the grant of the assignment application, and the losing applicant would have lost the comparative case even if earlier transfer of the permit (during the pendency of the comparative proceeding) has been sought. Similarly, in the proceeding underlying the grant of the permit to Eagle, 22, Ltd., the losing applicant was not entitled to integration credit, while the prevailing applicant was entitled to both integration credit and credit for white area service. Ft. Collins Telecasters, 103 F.C.C.2d 978, 984 n.12 (Rev. Bd. 1986), rev. den., 2 FCC Rcd 2780 (1987). The service to "white areas" transferred with the permit. Therefore, even had the losing applicant opposed the transfer of the permit, it, too, would not have been able to prevail. The assignment to a new party was a decisionally insignificant event. Thus, unlike the present case, in neither case did the filing and grant of the assignment

application result in a "change in core circumstances" which would render the Commission's earlier decision in error or necessitate a finding that the grant of the assignment was not in the public interest.

In contrast, when it has been claimed that the decisional significant superior qualifications of the winning applicant/transferor will be lost by virtue of a grant of an assignment applicant, and that matter is squarely placed before the Commission, the Commission specifically has undertaken an analysis of the comparative credit awarded to the applicant, the extent to which the credit still will be maintained after the grant of the application, and whether the Commission's licensing process would be infringed by grant of the application, all to determine whether grant of the assignment application would be warranted. As the Commission noted in undertaking such an analysis involving the assignment of a bare permit in the recent case of Urban Telecommunications Corp., 7 FCC Rcd 3867 (1992):

In resolving the comparative issues facing the applicants, the Review Board held that Urban was the superior applicant under the Commission's integration criterion and thus was entitled to a preference over its rivals. Washington Christian Television Outreach, Inc., 99 FCC 2d at 426. Because Urban's proposed the full-time integration of White, Urban's quantitative integration factor was 100 percent. Id. at 426. In addition, Urban was entitled to a qualitative enhancement of its integration credit since White has been a long-time resident of the service area and is a member of a minority group. Id. While the applicant with the next highest quantitative integration credit (WCST-TV with 78.04 percent of full credit) was also awarded qualitative enhancements of its credit because "minority

and women held a 78.04-percent interest in WCST-TV," the Board noted that it is well established that qualitative attributes, such as minority ownership, may enhance the value of integration proposals but cannot overcome clear qualitative differences....It is...clear from this record in this pro forma application proceeding that White will maintain his 100-percent integration well beyond the one-year holding period for new stations. See 47 C.F.R. § 73.3597(a). Therefore, the pro forma change of the permittee corporation has not materially altered any commitments by Urban to the extent that the integrity of our licensing processes has been infringed.

Urban Telecommunications Corp., 7 FCC Rcd 3867, 3869 ¶ 11 (1992). The assignment application, therefore, was granted. Similarly, in Central Texas Broadcasting Co., 64 R.R.2d 332 (MMB 1987), an assignment application of a recently-granted permittee only was granted after it was determined that the decisionally significant promises it had made during the comparative hearing had been carried out. Id. at 335. In short, in both cases, it was only after the Commission was able to conclude that the integrity of the Commission's processes would not be harmed was a grant of the assignment applications at issue found to be appropriate.

As seen above, if such an analysis is undertaken in this case, it would be determined that the commitments and comparative entitlement accruable to the new permittee corporation will be significantly altered, and will lie below that credit already awarded to RRI. Decision, 4 FCC Rcd 4924, 4930 (Rev. Bd. 1989). In this proceeding, the substitution of a new applicant is a decisionally significant event. The "core circumstances" underlying the grant of the permit will be directly affected,

necessitating a thorough review of the merits of the assignment application in a hearing.<sup>6</sup> Additionally, Section 73.3597(a) embodies the Commission's basic policy against the transfer of permits obtained through the comparative hearing process. The Commission's policies restrict the ability of a permit holder to freely assign or transfer its permit, such that "if it appears that the station involved has been on-air by the current...permittee for less than one year, the application will be designated for hearing on appropriate issues" unless it was not awarded through the minority hearing process, involves an FM translator or booster, involves a pro forma assignment or transfer, or there exist other circumstances (such as death or disability, unavailability of capital, or other adequate showings of "changed circumstances" affecting the licensee or permittee subsequent to the acquisition of the permit) which establish that FCC consent to the proposed transfer will serve the public interest. The text of the rule nowhere restricts the applicability of the Rule to only "constructed" facilities. Rather, it appears on its face to apply to all stations that "[have] been operated on-air by the current...permittee for less than one year." 47 C.F.R. § 73.3597(a). The Commission is required to abide by its own rules.

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<sup>6</sup> The Commission also has required the designation of hearings in other contexts where applicants file applications whereby they propose to withdraw service they had proposed to the public. See, e.g., KTVO, Inc., 46 Fed. Reg. 27756 (May 21, 1991), and Elba Development Corp., 47 Fed. Reg. 53478 (Nov. 26, 1982), where applications were designated for hearing where withdrawal of service to "white areas" were submitted.

Reuters Limited v. FCC, 781 F.2d 946 (D.C. Cir. 1986).. Therefore, Bott's (and the Commission's) restrictive reading of the rule should not be maintained.

Moreover and perhaps more importantly, no policy reason exist for such a restrictive reading. The Commission awarded the permit to Bott based upon a specific set of facts -- namely, that Bott would work at the station, full-time, in a management position. In this case, a promise of anything less would have resulted in an award of the permit to RRI. The Commission awards integration credit in situations where:

an applicant sets forth a specific integration proposal, does not depart from it, and provides reasonable assurance that it will be carried out.

Bradley, Hand and Triplett, 89 F.C.C.2d 657, 662-63 (Rev. Bd. 1982). As the Commission has stated:

it is important that integration proposals be adhered to on a permanent basis.

Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 395, 396 n.6 (1965). Here, despite that importance, Bott has wishes to abandon his integration proposal. In light of that broken pledge, his assignment application should not be simply "granted" without a thorough examination of the public interest benefits (if any) underlying the application.

**B. Bott Has Not Alleged Sufficient "Changed Circumstances" to Warrant Grant of His Application**

Bott does not allege the occurrence of a "death," "disability" or an "unavailability of capital" in support of the grant of his assignment application. Instead, Bott attempts to

justify a grant of the assignment on the fact that the "particular" format and programming he intended to broadcast (religious) already is present in the market, he could not develop a profitable station in the current economic marketplace. Bott Opposition, Attachment A. Neither of these matters constitute "changed circumstances" sufficient to justify grant of the application.

As to the unavailability of the specific "format" Bott wished to adopt, Bott's integration proposal was not made "contingent" upon the availability of that specific format, and in any event, it is well-established that a permittee is free to adopt any format without prior consent from the Commission. For the Commission to allow an applicant simply to abandon its integration pledge simply because it cannot develop the specific "type" of station it claims it wanted will open up the entire comparative hearing process to all manner of abuse and subjective, post-hoc rationalizations inconsistent with the Commission bedrock principle that "integration proposals should be adhered to on a permanent basis." Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 395, 396 n.6 (1965). The unavailability of a specific format does not constitute the type of weighty "changed circumstances" the Commission otherwise requires an applicant to establish.

Similarly, Bott's belief that changed financial circumstances warrant the transfer of the permit also are misplaced. As to both matters, the Commission has stated:

[t]he Commission...is not the guarantor of the financial success of its licensees. That is a

judgement to be made by the applicants and the marketplace. As we stated in Triangle Publications, Inc.:

we are not generally concerned with the competitive status of licensees and are not insurers of lucrative operations.....[A licensee's] private objective, then, is of little weight in the determination of the ultimate public interest.

Triangle Publications, Inc., 29 F.C.C. 315, 318 (1960), affirmed sub nom. Triangle Publications, Inc. v. FCC, 291 F.2d 342 (1961).

As the Commission stated even more recently in the case of PZ Entertainment Partnership, L.P., 6 FCC Rcd 1240 (1991), "we believe it is inappropriate to use the potential profitability of a station as a basis for waiving compliance with our rules...." Id. at 1243 ¶ 16. Similarly here, it would be wholly inappropriate to waive the Commission's policy requiring applicants to adhere to their integration proposals on a permanent basis based purely on economic grounds.

Perhaps even more importantly, Bott's claimed rationale for attempting to abandon the facility and to "take the money and run" is the recent initiation of service of religious Station KRSS, Chubbuck, Idaho. Bott's excuse, however, does not withstand scrutiny. As seen in Attachment 1, an analysis has been undertaken of the present and proposed coverage of KRSS compared with KCVI, along with an examination of the present service being provided by KRSS. As seen, if Bott were to commence service, Bott will serve an area 15.2 times larger than KRSS, and will serve 2.55 times as many persons as KRSS. Therefore, KRSS serves an area that



is only 6.5% of the area that will be served by Bott's KCVI. Moreover, KCVI will serve 3.1 times the area to be served by KRSS' authorized (but not yet constructed) Class C2 facility and 2.07 times the population that will be served by KRSS. In other words, KRSS (if and when it constructs its Class C2 facility) will serve only 32.6% of the area to be served by Bott's KCVI facility.

Therefore, Bott's claims of being caught in a position of "competitive disadvantage" is totally false. Where Bott to initiate service, it immediately will assume the position of being the dominant religious broadcaster in the "Blackfoot" market. Similarly, he will be in a far stronger position competitively than in other markets in which he operates. For example, in the "Blackfoot" market, he will have only one competitor -- KRSS. In the case of another Bott facility, KCIV, Mt. Bullion, California, Bott is faced with seven aural competitors (three FM<sup>7</sup> and four AM stations<sup>8</sup>). These stations completely divide the "Mt. Bullion" market such that Bott's proportionate share of the marketplace is only 59,986 persons.<sup>9</sup> In contrast, in the Blackfoot marketplace Bott's proportionate share of the marketplace will be 169,595 persons -- 2.6 times larger than his share in the "Mt. Bullion" market. Thus, his recent claim to the Commission that he has lost

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<sup>7</sup> Station KEFR, Le Grande, California and KFNO, Fresno, California.

<sup>8</sup> Station KBIF, Fresno, California; KIRV, Fresno, California; KEYQ, Fresno, California; and KRDU, Dinuba, California.

<sup>9</sup> His proportionate share in the Mt. Bullion market would be computed to be even smaller if the coverage of the AM stations also were to be included.

a "good market opportunity" is makeweight and false. The size of or the competitive situation in the Blackfoot market provides absolutely no public interest justification for allowing him to abandon his prior pledges to the Commission or for his assignment application to be granted. Similarly, his suggestion that many of the programs (clients) to which he would sell time are not available in the "Blackfoot" market also is false. As seen in Attachment 2, only 10% of the programs carried currently on Bott-owned Station KCIV, Mt. Bullion, California currently are carried on KRSS.

In short, there has been no "death," "disability," "unavailability of capital," or other weighty changed circumstance within the meaning of Section 73.3597(a)(4) warranting Bott's attempt to "blink away" the promises he made in the comparative hearing in this proceeding.

**C. Grant of Bott's Application in These Circumstances  
Is Contrary to the Public Interest and Will Permit  
Abuse of the Commission's Processes**

Finally, for Bott to claim that grant of the assignment application "does no violence" to the integrity of the Commission's licensing process (Bott Opposition at 6-7) is naive and false. As the Review Board has observed even with regard to the Commission prior<sup>10</sup> policy of releasing applicants from their comparative

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<sup>10</sup> The Commission now requires applicants to fulfill pledges made in their applications if cases are not settled prior to the exhibit exchange date in a proceeding. "After the exhibit exchange date, the successful applicant will be expected to fulfill its divestiture and integration proposals." Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 3403, ¶ 6 (1991).

pledges even after the settlement of cases:

With all due respect, the Board believes that the policy change that permits applicants to abandon or ignore comparative representations in the case of settlement contributes to the abuse of the comparative process just addressed in Revision of Application for Construction Permit for Comparative Broadcast Station (Form 301), Gen Dkt. Nos. 88-328, 81-742, FCC 89-110, released April 20, 1989.

WCVO, Inc., 5 FCC Rcd 4079, 4080 n.4 (Rev. Bd.). Quite frankly, allowing an applicant to simply "pledge" integration and receive full credit for that claim for any reason, knowing full well that it not only can break that pledge prior to construction while also nevertheless receiving 100% of its invested funds back is contrary to the Commission's basic policy requiring pledges to carry with them a degree of "permanency," and also allows applicants (such as Bott) with suspect or insincere integration pledges to nevertheless maintain their pledges after the exchange of exhibits for the sole reason to attempt to market the permit, recoup their expenses, and come away from the process whole (a practice that innocent, "losing applicants" who would have prevailed had the intended "sale" been announced earlier, cannot benefit from). The potential for abuse, whereby applicants will be free to maintain their pledges "just long enough" to obtain the permit for later sale, cannot be underscored enough. As seen in a case such as this, it is RRI who should be receiving the permit and holding the right to serve the Blackfoot populace.<sup>11</sup> Approving the transfer to a party that is,

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<sup>11</sup> In fact, a "Petition to Reopen the Record" has been filed with the full Commission requesting such relief, and a "Petition for Recall of the Mandate of the Court and for Remand to Reopen the

in essence, nothing more than a "white knight" outside party is contrary to Commission policy (Rebecca Radio of Marco, 4 FCC Rcd 937 (1990)), and damaging to the public interest.

WHEREFORE, it is respectfully requested that the "Petition to Deny" filed by Radio Representatives, Inc. on October 26, 1992, be granted, and the application of Richard P. Bott, II for the assignment of Station KCVI(FM), Blackfoot, Idaho, to Western Communications, Inc., be denied.

Respectfully submitted,

RADIO REPRESENTATIVES, INC.

By: 

Dan J. Alpert

Its Attorney

1250 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 637-9158

November 23, 1992

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Proceeding" has been filed with the United States Court of Appeals.

**ATTACHMENT 1**

ENGINEERING STATEMENT  
of  
NORWOOD J. PATTERSON  
Consulting Radio Engineer  
re  
BOTT's OPPOSITION TO RRI's PETITION TO DENY  
and  
OPPOSITION TO REOPEN THE RECORD

Exhibit \_\_\_\_\_ Page 1

Client RRI/BOTT

Date 11/19/92

FCC form \_\_\_\_\_ Sec. \_\_\_\_\_ Pg. \_\_\_\_\_

I, NORWOOD J. PATTERSON, am a consulting radio engineer, have practiced before the Federal Communications Commission for over 35 years, and my education and background are on file with the Commission.

ABSTRACT

I have reviewed Bott's Oppositions referenced above and have performed the attached engineering study to determine the comparative relationship between the KCVI Construction Permit Channel 268C for Blackfoot, Idaho, with the Station KRSS licensed facility and its Construction Permit for Chubbuck, Idaho. The engineering study herein documents the following:

- (1) The KCVI Construction Permit was issued November 23, 1991. Station KRSS is presently operating as a Class A FM facility on Channel 252A and has a Construction Permit for Channel 253C2 issued May 8, 1992.
- (2) The KCVI Construction Permit will serve 12.21% of the entire area of Idaho state.
- (3) The KCVI Construction Permit will serve an area 15.2 times (26,430 sq. km.) larger than the area served by Station KRSS' licensed facility, and will serve 3.1 times more area than will Station KRSS' Class C2 facility.
- (4) The population served by the KCVI Construction Permit will be 223,271 persons, which is 2.6 times larger than the population served by Station KRSS' present operation, and will be 2.1 times larger than population that will be served by Station KRSS' Construction Permit Class C2 facility after it is built and on the air.

### DISCUSSION

This engineering study was performed using the FCC Data Base files for each station, as tabulated in Exhibit G. These Data Base files were released by the Commission on October 5, 1992.

Calculations were performed by computer programs based on FCC algorithms for determining distance to contours. Contours were plotted by calculating co-ordinates for each point on the contour every 2.5°. From this data the area of the contour was calculated. See Exhibit F.

Using the computer generated distance to contours, the predicted 60 dBu contour for each station was plotted for visual comparison. The KCVI Construction Permit's predicted 60 dBu contour and Station KRSS' present licensed facility are plotted on Exhibit A, Page 1 and Page 2. Page 1 displays graphically the area of the KCVI Construction Permit compared with KRSS' present licensed operation. Station KRSS serves only 1704 sq. km., compared to the proposed KCVI Class C Construction Permit which will serve 26,430 sq. km. Therefore, KRSS' present licensed facility serves only 6.5% of the area that is projected to be served by the KCVI Construction Permit as a major Class C facility.

Exhibit A Page 2 shows the 60 dBu contours of the KCVI Construction Permit and the present licensed operation of Station KRSS. Each town within Snake River Valley of Idaho to be served by the KCVI Construction Permit and not served by KRSS' present facility is circled and identified. There are more than 70 cities which will be served by the KCVI Construction Permit, which are not served by Station KRSS. The cities have a population of more than 135,888 persons. See Exhibit I Table B.

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To give a visual presentation of the much larger area served by the KCVI Construction Permit's 60 dBu contour than which will be served by Station KRSS operating on Channel 253C2, both contours were plotted on the same map. See Exhibit B Page 1. The 60 dBu contours of the KCVI Construction Permit and Station KRSS' Construction Permit are plotted on Exhibit B, Page 2. On this map are circled in blue all cities not served by Station KRSS even with their upgrade from Class A to Class C2. Station KRSS' proposed increased facility from its licensed operation to a Class C2 facility increases the number of towns served by its licensed facility by only 17. Therefore, after Station KRSS upgrades its facility, there will be 53 cities which will be served by the KCVI Construction Permit and will not be served by Station KRSS' Class C2 facility.

Within these 53 towns and surrounding area, 115,919 persons will be served by the KCVI Construction Permit and will not be served by Station KRSS even with its upgrade to a Class C2. The state of Idaho is primarily a rural populated area. There are only three cities with population more than 30,000 persons, based on 1990 Census: Boise, Pocatello, and Idaho Falls. Two of these cities (Pocatello and Idaho Falls) plus the highly populated rural area within the Snake River Valley will be served by the KCVI Construction Permit. Only one of these cities, Pocatello, is served by Station KRSS. Idaho Falls will still not be served by Station KRSS even with its upgrade to Class C2. See Exhibit B and I, Table B.



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To show the increased area to be served by the improved facility of Station KRSS compared to the area of the KCVI Construction Permit, all three of the 60 dBu contours were plotted in Exhibit C Page 1. This plot also contains a tabulation of area and population of Station KRSS compared to the KCVI Construction Permit. It clearly demonstrates that the present facility of Station KRSS serves only 6.5% of area to be served by the KCVI Construction Permit; and when Station KRSS improves its facility to Class C2, it will serve only 32.6% of the area to be served by the KCVI Construction Permit; i.e., even with the improved KRSS facility (which is not yet operating or built), less than 1/3 of the area to be served by the KCVI Construction Permit will be served by Station KRSS. Exhibit C Page 2 has plotted on a map the 60 dBu contours of the KCVI Construction Permit with the licensed facility and Construction Permit of Station KRSS. Tabulated on this map are also the area and population comparisons of Station KRSS to the KCVI Construction Permit.

Tabulated in Exhibit D are distances to the 60 dBu contours from which contours in Exhibit A, B & C were plotted. These distances were calculated in compliance with FCC Rules & Regulations from station data derived from FCC Data Base dated September 5, 1992.

For calculating the location of the 60 dBu contours of each station, a set of co-ordinates was calculated by computer program for a point each 2.5° in azimuth change. The computer program then plotted the locus determined

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